82-1831

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. _____

ADRIANO B. FIERROS, ROBERTO GONZALEZ FIERROS, and RALPH ANTHONY PEREZ,

Petitioners,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I

Whether petitioners were denied due process of law by the action of the district court in precluding their assertion of the defense of mistake of law as negating the specific intent necessary for conviction of the crime with which they were charged?

II

Whether petitioner Perez was denied due process of law resulting from the denial of his motion to dismiss arising out of the release of certain alien material witnesses?

TABLE OF CONTENTS

Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Petition for Writ of Certiorari	1
Opinions Below	2
Jurisdictional Grounds	2
Constitutional Provisions Involved	3
Statement of the Case	4
Reasons for Granting Writ	13
I Petitioners Were Denied Due Process Of Law By The Precluclusion Of Their Proffered Defense Of Mistake Of Law As Negating The Requisite Specific Intent Necessary To Convict Them Of The Crime With Which They were Charged.	13
II The Decision Of The Ninth Circuit Is In Conflict With The Decisional Law Of The Fifth Circuit Relating To The Availability Of The Defense Of Ignorance Of The Law Where A Specific Intent Crime Is Charged.	19
III Petitioner Perez Was Denied Due Process Of Law Resulting From The Denial Of His Motion To Dismiss Arising Out Of The	

III Release Of Alien Material Witnesses. 22

A. The Release Of The Alien Material Witnesses At A Proceeding During Which Petitioner Perez Was Unrepresented By Counsel Denied Him His Constitutional Right To Counsel. 22

B. The Court Of Appeals' Ruling Denies Petitioner Due Process Of Law In Holding Him To A Standard Not In Effect At The Time Of His Trial. 27

Conclusion 29

Proof of Service

Appendix "A"

Appendix "B"

Appendix "C"

TABLE OF AUTHORITIES

Cases

	Pages
Cooper v. Fitzharris 586 F.2d 1325, 1332 (9th Cir. 1978)	27
Geders v. United States 425 U.S. 80, S.Ct. 1330, 47 L.Ed.2d 592 (1976)	25
Gideon v. Wainwright 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	25
Glasser v. United States 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942)	25
Herring v. New York 422 U.S. 853, 95 S.Ct. 2440, 45 L.Ed.2d 593 (1975)	25
Hollway v. Arkansas 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)	26
Johnson v. Zerbst 304 U.S. 458, 464 (1937)	24
People v. Howard 139 Cal.App.3d 1020, 1023-1024 (1983)	22
Powell v. Alabama 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)	26
United States v. Granda 565 F.2d 922 (5th Cir. 1978)	21

United States v. Lizarraga
541 F.2d 826 (9th Cir. 1976) 17

United States v. Moreno
561 F.2d 1321, 1323 (9th Cir. 1977) 18, 19

United States v. Peterson
513 F.2d 1135 (9th Cir. 1975) 14, 15

United States v. Schilleci
545 F.2d 519 (5th Cir. 1977) 20, 21

United States v. Schnaiderman
568 F.2d 1208 (5th Cir. 1978) 21

United States v. Valenzuela-Bernal
_____ U.S. ___, 102 S.Ct. 3440,
73 L.Ed.2d 1193 (1982) 23, 28

United States v. Wellendorf
574 F.2d 1289 (5th Cir. 1978) 21

Constitutional Provisions and Statutes

United States Constitution
Amendment Five 3

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NO. _____

ADRIANO B. FIERROS, ROBERTO GONZALEZ FIERROS, and RALPH ANTHONY PEREZ,

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-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioners, Adriano B. Fierros, Robert Gonzalez Fierrros and Ralph Anthony Perez, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered November 26, 1982.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit entered its opinion affirming petitioners' convictions on November 26, 1982. The opinion of the Court of Appeals, certified for publication, is reported at 692 F.2d 1291 (9th Cir. 1982). A copy of of that opinion is attached as Appendix "A". On March 8, 1983, the Court of Appeals amended its opinion to correct certain factual inaccuracies contained therein. This amendment is attached as Appendix "B" (The reported decision does not contain the corrections ordered by the Court of Appeals). On April 8, 1983, an order was entered denying petitioners petition for rehearing and rejecting their suggestion for rehearing en banc. A copy of the order is attached as Appendix "C".

JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Ninth Circuit was entered

on November 26, 1982. A timely petition for rehearing, with suggestion for rehearing en banc, was ordered denied on April 8, 1983. This petition is filed within 60 days of that date and is therefore timely. This Court's jurisdiction is invoked pursuant to Title 28, U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Amendment Five, provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

I

Petitioner Adriano B. Fierros is a licensed labor contractor who supplies workers to farms in the Madera, California area. The other petitioners were employed by petitioners Adriano B. Fierros to assist him in fulfilling his labor contracts to the various ranchers in the Madera, California area. Petitioner Roberto Fierros is the father of petitioner Adriano B. Fierros. Anticipating a demand for workers during the tomato harvest, petitioner Adriano Fierros contracted with Andres Guillen for the transportation of workers to Madera. Adriano told Guillen that he preferred workers from the Mexican state of Oaxaca. It was agreed that if Guillen brought Oaxacans who could not pay the entire $80-$100 transportation fee, Adriano would pay Guillen the balance owed to him for his transportation services upon delivery. Adriano also agreed with Guillen to deduct any

portion of the transportation fee owed to Guillen by the workers from their first week's wages, with the permission of the workers, and remit it to Guillen at the time of the next delivery. Pursuant to this agreement, Guillen delivered between 250 and 300 workers to Adriano during the summer of 1981.

Guillen recruited the individuals whom he supplied to petitioners in San Diego County and transported them to Madera in rented trucks. These trucks were met by either petitioner Perez or Adriano in Madera where they took custody of the workers and received a list from the transporter specifying the amount due for each worker's transportation. These persons were then transported to the fields in petitioner Perez' bus.

During the course of this operation, several truckloads of workers destined for Madera were intercepted by the Border Patrol and the drivers arrested. Following these

arrests, Guillen hired Robert Velasquez to drive. Velasquez notified the Border Patrol and agreed to participate in this scheme as a government informant. Velasquez testified at the time of trial that he had delivered truckloads of workers to petitioner Perez on several occasions. He also witnessed discussions that petitioner Adriano Fierros and petitioner Roberto Fierros had with Amador Bonillo, a scout car driver, concerning future deliveries.

On two occasions Velasquez delivered loads of workers infiltrated by undercover Border Patrol operatives to petitioner Adriano Fierros or to petitioner Perez. On the second of these occasions, August 27, 1981, petitioner Perez accepted a load of workers that included five undercover operatives. These individuals were loaded into the bus operated by petitioner Perez and put to work. Later that day, petitioner Adriano Fierros paid Velasquez for the transportation of one

of these persons, using a check signed by him and payable to the worker under his assumed name.

Petitioner Ralph Perez was arrested that same day, August 27, as he drove the bus carraying the workers to the fields. Seventeen illegal aliens found riding on the bus were arrested with him and detained until September 9 when a federal magistrate ordered their release. Petitioners Adriano and Roberto Fierros were also arrested on August 27. All three petitioners were susbsequently indicted in a single count indictment charging them with conspiracy to harbor and transport aliens in violation of 18 U.S.C. Sec. 371 and 8 U.S.C. Sec. 1324(a).

At the trial of this case, petitioners proffered a two-pronged defense to the charge. Petitioners claimed that although they suspected that the individuals who were being transported to them to be included within their work crews were persons unlaw-

fully within the United States, they felt that their activities in deducting the amounts owed by the persons transported to the transporter from the salary of those persons, and paying over these amounts to the transporters on the following occasion, were within the course and scope of the employment relationship and, therefore, outside the reach of criminal liability proscribed by 8 U.S.C. Sec. 1324(a).[1/]

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1. 8 U.S.C. Sec. 1324(a) provides in pertinent part:

> "Any person . . . who --
> (3) willfully or knowingly conceals, harbors, or shields from detection . . . any alien . . . not duly admitted by an immigration offier or not lawfully entitled to enter or reside within the United States . . . shall be guilty of a felony . . . Provided however, that for the purpose of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

In addition, petitioners sought to establish that even if their conduct was outside the reach of the normal incidents of employment, they did not believe their activities were unlawful, so that their mistake of the law would negate the specific intent necessary to convict them of the offense charged. Although the district court permitted the presentation of the first as- of the defense as outlined above, it refused to permit the introduction of any evidence as to ignorance of the law, refused to give the standard Devitt & Blackmar instruction concerning ignorance of the law as negating specific intent (Devitt & Blackmar, section 14.10, 3d Edition) although requested in a timely fashion by defense counsel, and, at the request of the government, and over defense objection, deleted language from the standard specific intent instruction (Devitt & Blackmar, Section 14.03, 3d Edition), which language indicated that intent to violate the

the law was required in order to establish a specific intent ("purposely intending to violate the law").

Specifically, an offer of proof was made by counsel for Adriano Fierros on two occasions concerning the evidence he wished to introduce in support of his claim of ignorance of the law as negating specific intent. That offer of proof was that Agent Nuchereno, the case agent who presented the case to the grand jury, testified before that body that this prosecution was the first instance of a labor contractor ever being prosecuted for alien-related activities in the San Jaoquin Valley , where the Fierros' operation was headquartered. Adriano Fierros, if permitted, would testify that he did not believe that anything that he was doing was wrong and that from his understanding of the immigration laws, an employer, and employment itself, including transportation incidental to employment, as well as the activities that he was

engaged in in deducting money from the worker's checks with their permission, and paying that over to the smuggler, was nothing more than a natural and normal incident of employment as that phrase is used in 18 U.S.C. Sec. 1324.

The district court, after hearing these offers of proof, refused to permit the introduction of any of the evidence encompassed thereby, or to permit the introductionof any evidence tending to establish ignorance of the law in any form whatsoever.

On appeal, the Court of Appeals endorsed the view of the district court, and held that the defense of ignorance of the law is permitted in only two distinct cases. The first of these is a situation where the defendant is ignorant "of an independently determined legal status or condition that is one of the operative facts of the crime." 692 F.2d at 1294. The second category of cases in which the court held that the defense was available

is in the situation where that defense has been read into criminal statutes involving "prosecution under complex regulatory schemes that have the potential of snaring unwitting violators." 692 F.2d at 1295. Since the Ninth Circuit determined that petitioners' proffered defense fell into neither of these two categories, it upheld the action of the district court in precluding the defense in the circumstances of this case.

This holding by the Ninth Circuit has created a split in authority concerning this question with the Fifth Circuit, which has determined that the defense of ignorance of the law is available to a criminal defendant whenever he is charged with a specific intent crime. Thus, this an appropriate case for a grant of certiorari as it falls within the category of cases outlined in Rule 17(a), of the rules of this court.

REASONS FOR GRANTING THE WRIT

I

Petitioners Were Denied Due Process Of Law By The Preclusion Of Their Proffered Defense Of Mistake Of Law As Negating The Requisite Specific Intent Necessary To Convict Them Of The Crime With Which They Were Charged.

The Ninth Circuit's opinion holds that the defense of ignorance of the law is available as a defense to a specific intent

2 Although this issue was treated by the Ninth Circuit as one of "ignorance of the law", it is more properly denominated a question of "mistake of law", as petitioners sought to assert that they believed that their conduct was within the exception for the usual and normal practices incident to employment, rather than asserting that they were ignorant of the provisions of the law.

crime in only two situations. The court asserted in its opinion that, "the first category involves instances of where the defendant is ignorant of an independently determined legal status or condition that is one of the operative facts of the crime", and cited as an example United States v. Peterson 513 F.2d 1135 (9th Cir. 1975). 692 F.2d at 1294. An examination of Peterson, supra, however, will reveal that the court in that case did not limit the applicability of its holding to the situation specified by the Ninth Circuit, and no statement even remotely suggesting that limitation is contained within the decision of the Peterson court. That court merely determined that the crime of which the defendant in that case was charged was a specific intent crime, and, for that reason, he was entitled to assert ignorance of the law as a defense to the specific intent element.

Even assuming that the Ninth Circuit is correct

in holding that the Peterson case limits the availability of the defense to situations similar to that presented in that case, its interpetation of the Peterson situation is far too narrow. The opinion asserts that Peterson is an example of the situation where "the defendant is ignorant of an independently determined legal status or condition that is one of the operative facts of the crime." Id. However, the opinion can just as easily be read as limiting (if at all) the availability of the defense where the defendant attempts to rely upon the apparent authority of another in a position superior to him as to the facts surrounding his conduct. When so read, the defense in question should have been available to petitioners in this case. According to the offer of proof submitted to the trial court, petitioner Adriano Fierros would testify that upon contacting the Border Patrol station in Fresno on May 22, 1981, he spoke with an officer at

that location, Mr. McKay. McKay informed Adriano on this occasion that he had looked him up in a Rolodex file maintained in the office, and indicated that there was no record of his being under investigation by the Immigration and Naturalization Service at that time. This conversation, he would testify, reinforced his belief that his activities were not in violation of the law. Thus, petitioner Adriano Fierros was relying upon the apparent authority of the officer of the Immigration Service in Fresno to which he was directed, and that officer's representation that he was not on record with the office. Therefore, he reasonably believed that his activities were lawful. Petitioners Ralph Perez and Roberto Fierros are in the same position, as they they relied upon statements made to them by their boss, Adriano Fierros, to the effect that their activities were lawful, and reasonably relied upon this representation made

to them by petitioner Adriano Fierros.

The opinion of the Ninth Circuit goes on to note that the only other exception to the general rule precluding the defense of ignorance of the law is where such a defense "has been read into criminal statutes [involving] prosecution under complex regulatory schemes that have the potential of snaring unwitting violators," citing United States v. Lizarraga, 541 F.2d 826 (9th Cir. (1976). 692 F.2d at 1295. Again, this holding of the court finds no support in the case upon which it relies, Lizarraga, supra. The Lizarraga court merely examined the question as to whether the offense with which the defendant in that case was charged required specific intent. Once the court concluded that it did, it reversed the defendant's conviction for failure of the district court to permit the presentation of the defense of ignorance of the law. Lizarraga, supra, at 828.

The Ninth Circuit itself, in an earlier opinion, United States v. Moreno, 561 F.2d 1321, 1323 (9th Cir. 1977), implicitly recognized the dangers of unduly broadening the reach of the statute under consideration here. In holding that transportation incident to employment was also exempted from the reach of section 1324 the Moreno court noted:

> "A broader interpretation of the transportation section would render the qualfication placed there by Congress a nullity. To do this would potentially have tragic consequences for many American citizens who come into daily contact with undocumented aliens and who, with no evil or criminal intent intermingle with them socially or otherwise. It could only exacerbate the plight of these aliens and, without adding anything significant to solving the problem, create, in effect judicially, a new crime and a new class of criminals. All of our freedom and dignity as people would be so reduced." United States v. Moreno, supra, at 1323 (emphasis supplied).

Prohibiting the assertion of a defense defense of mistake of law, as was done in the instant case, has potentially equal adverse consequences, and the same vice condemned by the Moreno court -- snaring an unwitting violator -- is presented in this situation.

II

The Decision Of The Ninth Circuit Is In Conflict With The Decisional Law Of The Fifth Circuit Relating To The Availability Of The Defense Of Ignorance Of The Law Where A Specific Intent Crime Is Charged.

Although petitioners in the Court of Appeals repeatedly sought to draw the court's attention to the countervailing authority of the Fifth Circuit cited in petitioners' briefs before the Ninth Circuit, the opinion of the court failed to address, let alone distinguish, the Fifth Circuit cases cited to it. Specifically, petitioners in their briefs drew the courts attention to United

States v. Schilleci, 545 F.2d 519 (5th Cir. 1977). Schilleci was not a case falling into either one of the two categories of cases constituting the Ninth Circuit's view of the exceptions to the general rule that the defense of ignorance of the law is not available. Rather, in Schilleci, the defendant was the Chief of Police in a town in Louisiana who was charaged with wiretapping in violation of federal law, as well as perjury stemming from his denial of such wiretapping before the grand jury. The district court refused to permit Schilleci to posit his ignorance of the applicable law as a defense to the specific intent required to convict him of that offense. In reversing, the Fifth Circuit concluded that the crime charged was indeed a specific intent crime, and held that the refusal of the trial court to instruct on ignorance of the law as negating specific intent constituted reversal error:

> "In this case, the jury never had the opportunity

> to consider the effect of lack of knowledge on the requisite specific intent, since they were never charged they could so consider it. The ignorance of the defendant of the applicable law went to the heart of his denial of the specific intent necessary for a violation of law. The failure of the trial judge to so instruct the jury is error." 545 F.2d at 524.

See also, United States v. Granda, 565 F.2d 922 (5th Cir. 1978); United States v. Schnaiderman, 568 F.2d 1208 (5th Cir. 1978); United States v. Wellendord, 574 F.2d 1289 (5th Cir. 1978).

Here, as in Schelleci, supra, the petitioners' ignorance of the applicable law went to the heart of their denials of the specific intent necessary for a violation of law.

Since the Ninth Circuit's opinion is clearly at odds with the holding of the Fifth Circuit in the cases alluded to above, it is respectfully submitted that this is a peculiarly appropriate cases for the grant of certiorari pursuant to Rule 17(a) of rules of

this Court.

III

Petitioner Perez Was Denied Due Process of Law Resulting From The Denial Of His Motion To Dismiss Arising Out Of The Release Of Alien Material Witnesses.[3]

A. The Release Of The Alien Material Witnesses At A Proceeding During Which Petitioner Perez Was Unrepresented By Counsel Denied Him His Constitutional Right To Counsel.

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3. The California Court of Appeal in a recent opinion, has also held that the defense of ignorance of the law, or mistake of law, should be available to a criminal defendant whenever he is charged with a specific intent crime. People v. Howard, 139 Cal.App.3d 1020, 1023-1024 (1983).

In the district court proceedings, petitioner filed a motion to dismiss the indictment. That motion was based on the fact that the magistrate sitting in the United States District Court for the Southern District of California who heard the proceedings ordered the release of a number of alien material witnesses during the course of a judicial proceedings at which petitioner was unrepresented by counsel.

The Court of Appeals acknowleged that petitioner Perez was not then represented by counsel nor did he enter the stipulation of the other defendants authorizing the release of the material witnesses. Id. at 1296.

Nevertheless, the Court of Appeals held that the district court did not err in denying petitioner's motion to dismiss, citing the rationale of this Court's ruling in United States v. Valenzuela-Bernal, , 102 S.Ct. 3440, 3449, 73 L.Ed. 2d 1193 (1982).

It is petitioner's position that a waiver of his right to have compulsory process of

witnesses is so fundamental that the actions of the magistrate in ordering the release of the witnesses in a proceeding where appellant was not even represented by counsel is reversible error, irrespective of whether there is a showing of prejudice. As the United States Supreme Court has recognized in Johnson v. Zerbst, 304 U.S. 458:

> "It has been pointed out that 'Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that 'we do not presume acquiescence in the loss of fundamental rights.' A waiver is not ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel, must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1937).

As there was no waiver, the motion to

dismiss should have been granted irrespective of any showing, or lack thereof, of prejudice.

A number of cases ruled upon by this Court merit this conclusion.

In Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the appellant's conviction was reversed due to the refusal of the trial court to appoint any counsel for him.

In Geders v. United States, 425 U.S. 80, S.Ct. 1330, 47 L.Ed.2d 592 (1976), appellant' conviction was reversed due to defense counsel due to defense counsel not being permitted to confer with his client during an overnight mid-trial recess.

In Herring v. New York, 422 U.S. 853, 95 S.Ct. 2440, 45 L.Ed.2d 593 (1975), a state statute barring final summation by defense counsel was overturned.

In Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), coun-

sel was forced to represent defendants with conflicting interests, impairing his ability to fully serve either.

In Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), counsel was denied an adequate opportunity to confer with the defendant or prepare for trial.

Reversal in each of the above-cited cases was required for reasons amplified upon in Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173, 55 L.Ed.2d 426 (1978). In Holloway this Court held:

> ". . . When a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at leaset, the prosecution of a capital offense, reversal is automatic." Id. at 489.

The above-cited language has been interpreted by the Ninth Circuit to stand for the following:

> "When no counsel is provided, or counsel is prevented from discharging his normal functions, the evil lies in what the attorney does not do, and is either readily apparent on the

> the record, or occurs at a time when no record is made. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation, Id. at 491, 98 S.Ct. at 1182, and a rule requiring that the record reflect that the defendant was prejudiced . . . in some specific fashion would not be susceptible to intelligent, even handed application." Id. at 490, 98 S.Ct. at 1182. See, Cooper v. Fitzharris, 586 F.2d 1325, 1332 (9th Cir. 1978).

The Court of Appeals was thus in error in requiring petitioner to prove he was prejudiced by the actions of the magistrate in ordering the release of the material witnesses. For, as noted above, when petitioner is forced to proceed unrepresented by counsel, at a critical stage of the proceedings such as the hearing referred to above, reversal should be automatic.

B. The Court Of Appeals Ruling Denies Petitioner Due Pro- Law in Holding Him To A Standard Not In Effect At The Time Of His Trial.

Assuming,arguendo that the petitioner is not entitled to automatic reversal, it is submitted that he has been denied due process of law in being held to a standard of proof not in effect at the time of his trial In United States v. Valenzuela-Bernal, supra, this court ruled that the release of material witnesses does not require the dismissal of an indictment unless the defendant shows that the witnesses' testimony would have been both material and favorable. United States v. Valenzuela-Bernal, supra, at 102, S.Ct. 3440, 3449. The Court of Appeals faults petitioner for having made no effort to explain what material favorable evidence the departed witnesses would have provided for his defense.

Requiring petitioner to meet a standard of proof not even in effect at the time he was to have made the showing denies him due process of law, in that it fails to give him adequate notice of the standard of proof to which he is to be held. At the very least,

petitioner was and is entitled to a remand of the case to the district court so he can make an adequate showing in this regard. Failure to remand the case will result in the petitioner having been denied the very opportunity to prove what is required by a case decided a number of months after his conviction.

CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari issue to re- the ruling of the United States Court of Appeals for the Ninth Circuit to resolve the important questions of law presented herein.

Respectfully submitted,

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SAVITZ & McCABE
Attorney for Petitioners
Adriano B. Fierros and
Roberto Gonzalez Fierros

RICHARD M. BARNETT
Attorney for Petitioner
Ralph Anthony Perez

PROOF OF SERVICE

I, Michael J. McCabe, hereby declare:

I am a citzen of the United States of America, over the age of 18 years, and not a party to the within action.

My business address is 108 Ivy Street, San Diego, California 92101.

On May 9, 1983, I placed in an envelope with postage prepaid, a copy of PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT to the following:

The Honorable Rex E. Lee
Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 9, 1983, at San Diego, California.

Michael J. McCabe

MICHAEL J. McCABE

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellees,	)	
-vs-	)	CA NO. 81-1790 81-1791
ADRIANO B. FIERROS, RALPH ANTHONY PEREZ, and ROBERTO GONZALAZ FIERROS,	)	81-1792 DC NO. 81-1144K
Defendants-Appellants.	)	O P I N I O N

Appeal from the United States District Court for the Southern District of California Honorable Judith N. Keep, District Judge, Argued and Submitted September 6, 1981

BEFORE: HUG, FERGUSON and CANBY, Circuit Judges

CANBY, Circuit Judge:

Appellants were convicted of conspiracy to transport and harbor illegal aliens in violation of 18 U.S.C. section 371 and 8 U. S.C. section 1324(a). On appeal they contend that the district court's refusal to instruct the jury on their asserted ignorance of the law defense constituted reversible error. They also challenge the district court's denial of their motion for judgment of

acquittal. In addition, one appellant, Ralph Anthony Perez, contends that his indictment should have been dismissed because the release of material witnesses violated his due process rights. We affirm.

Facts

Adriano Fierros ("Adriano") is a labor contractor who supplies workers to farms in the Madera, California area. He employed his son, Roberto Fierros ("Roberto"), and Ralph Perez as foremen. Anticipating a substantial demand for workers during the tomato harvest, Adriano contracted with Andres Guillen 1/ for the transportation of workers to Madera. Adriano told Gullen he preferred workers rom the Mexican state of Oaxaca. It was agreed that if Guillen brought Oaxacans who could not pay the entire $80-$100 transportation fee, Adriano would pay Guillen the balance upon delivery. Adriano also agreed to deduct any portion of the transportation fee owed to Guillen by other non-Oaxacan workers from

first week's wages and remit it to Guillen at the time o the next delivery. Pursuant to this agreement Guillen delivered between 250 and 300 alien workers to Adriano during the summer of 1981.

Guillen recruited the workers in San Diego County and transported them to Madera in rented trucks. A scout car preceded each truck to watch for border patrol agents. Perez or Adriano met the trucks in Madera to take custody of the workers and receive a list specifying the amount due for each worker's transportation. The workers were then transported to the fields in Adriano's bus, which was equipped with a scanner device tuned to the border patrol's radio frequency.

Several truckloads of workers sent by Guillen from San Diego County were intercepted by the border patrol, and the drivers arrested. After these arrests, Guillen hired Robert Velasquez to drive. Velasquez notified the border patrol and agreed to

participate in the scheme as a government informant. Velasquez tstified that he delivered truckloads of workers to Perez on several occasions. He also witnesses discussions that Adriano and Roberto had with Amador Bonillo, the scout car driver, concerning future deliveries. On two occasions Velasquez delivered loads of workers infiltrated by undercover border agents to Adiano and Perez. On te second of these occasions, August 27, 1981, Perez accepted a load of workers that included fiver undercover agents The agnts were loaded onto Adriano's bus and put to work. Later that day, Perez paid Velasquez for the transportation of one of those agents, using a check signed by Adriano and payable to the worker-agent uner his assumed name.

Perez was arrested that same day, August 27, as he drove the bus carrying workers to the fields. Seventeen illegal aliens found riding on the bus were arrested with him and

with him and detained until September 9, when the magistrate ordered their release. Adriano and Roberto were indicted for conspiracy to harbor and transport aliens, in violation of 18 U.S.C. section 371 and 8 U.S.C. section 1324(a). They were convicted in a jury trial.

Ignorance of the Law

Appellants argue that the district court erred in precluding their presentation of a defense based on ignorance of the law. Section 1324(a) imposes criminal liabiity on any person who knowingly or willfully conceals or harbors any alien not legally in the United States. The statute also provides that employment, which is defined to include the usual and normal practices incident to employment, shall not be deemed to constitute harboring. 2/

At trial appellants' defense focused on the employment exception Section 1324(a). Appellants did not deny that the workers delivered to them Guillen were illegal aliens

nor that they knowingly transported them within the United States. They claimed, however, that paying Guillen for the workers' transportation and subsequently transporting them by bus to the fields were "usual and normal practices incident to employment" and thus could not subject them to criminal liability. Alternatively, they contended that if their activities were not shielded by the employment exclusion, their mistaken belief that they did act incident to the workers' employment was justifiable ignorance of the law which negated the "specific intent" required by 1324(a).

Appellants' primary argument on appeal is a renewal of the latter contention. They offered to prove at trial that Adriano believed his activities were incident to his employment of workers and were thus lawful.3/ Adriano also propsoed to testify that he had advised Perez and Roberto that their participation in the scheme was lawful. Adriano's

conclusions were allegedly based in part on his telephone conversation with a border patrol agent who told Adriano that he was not under investigation at that time. The district court excluded the proffered evidence and refused to give a jury instruction that ignorance of the law should be considered in determing the existence of specific intent. See Devitt and Blackmar, Federal Jury Practice and Instructions section 14.10. Appellants contend that the districtcourt's rulings were in error because section 1324(a) requires a showing that the defendants knew that their conduct was illegal.

Appellants' contention is supported neither by section 1324 nor by the authority upon which they rely. Section 1324()(2) states that any peson is guilty of a felony who transports an alien "knowing that he is in the United States in violation of law, and knowing or having reasonable grounds

to believe that his last entry into the United States ocurred less than three years prior thereto. . . ." Section 11324(a)(3) provides that one is similarly guilty who "willfully or knowingly conceals, harbors, or shields from detection . . . any alien . . . not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States. . . ." While this provisions require knowledge or willfulness, they do not by their terms require knowledge thatthe actions engaged in vioalate the statute. On the contrary, the first requirement of knowledge is that of the status of the alien, and te second requirement of willfullness or knowledge goes to the fact of concealing, harboring or shielding from detection. The proviso upon which appellants rely simply states that "employment (including the usual and normal practices inident to employment) shall not be deemed to

constitute harboring." Nothing in the proviso deals with knowledge or intent, or the effct of their absence. It stretches the language unduly to read it as meaning that "activities believed by the defendant to be employment" are outside of the proscription of the Act. 4

Appellants assert, however, that when a crime includes a requisite element of specific intent, an instruction must be given that ignorance of the law may be considered to negate the existence of that intent. They rely on such cases as United States v. Peterson, 513 F.2d 1133 (9th Cir. 1975) and United States v. Lizzaraga-Lizzaraga, 541 F.2d 826 (9th Cir. 1976). Appellants' contention, howver, is much too broad to be accepted here and the cases upon which they rely are distinguishable.

A moment's thought is enough tor refute the general proposition that ignorance of the law is a proper defense to any crime requir-

ing specific intent. To obtain a conviction for assault with intent to commit murder, the prosecution must prove a specific intent to kill. E.g., United States v. Jones (No. 81-1138X) (9th Cir. July 13, 1982). It is clear however, that one acused of such an offense is not entitled to the defense that he entertained a good faith belief that it did not violate the law to assault someone with the intent to kill him.

There are however, two categories of cases in which a defense of ignorance of law is permitted even though it is not specifically written into the criminal statute. In our view, the present case falls into neither. The category involves instanaces where the defendant is ignorant of an independently determined legal status or ondition that is one of the operative facts of the crime. An example is United States v. Peterson, supra, the first case relied upon by

by appellants. In that case defendant was charged with embezzlement or theft o federal property in violation of 18 U.S.C. section 641, a crime requiring proof of specific intent. We held there that Peterson was entitled to an instruction on his defense that he reasonably believed that the person from whom he bought the property was legally authorized to sell it. In such a case, the mistake of the law is for practical purposes a mistake of facat. See also United States v. Barker, 546 F.2d 940, 946-54 (D.C. Cir. 1976); United States v. Currier, 621 F.2d 7, 9 n.1 (1st Cir. 1980) (citing United States v. Freed, 401 U.S. 601, 612 (1971) (Brennan J. concurring). This type of defense would have been available to appellants in this case if, for example, they had asserted reasonable grounds to believe that the workers were not aliens or that they had been legally admitted to the United States. It cannot be extended to cover an assertion

that while they knew that the workers were illegal aliens, and they kenw they were transporting or shielding them, they were unaware that section 1324 prohibited their conduct.

The second category of cases in wich a defense of ignorance of the law has been read into criminal statutes involves prosecution under complex regulatory schemes that have the potential of snaring unwitting violators. United States v. Lizarraga-Lizarraga, supra; the second case relied upon by appellants, falls into this category. There we held that a defendant could not be convicted of exporting a prohibited substance, in violation of 22 U.S.C. section 1934, absent a showing that he knew that export of the substance in question was prohibited. We relied on two factors: The statute prohibited the export of a list of items found in the statute itself, and the list included many items that were not known to be subject to

government control and that might be innocently imported or exported. Acord, United States v. Davis, 583 F.2d 190 (5th Cir. 1978); see also United States v. Granda, 565 F.2d 922 (5th Cir. 1978); cf. Lambert v. California, 355 U.S. 225 (1957) (due process requires proof of knowledge of ordinance requiring felons to register upon entering city). The same considerations have led to rulings that a conviction for "willful" violations of the tax laws requires a showing of intentional violation of a known legal duty. See United States v. Pompinio, 429 U.S. 10, 12 (1976); United States v. Bishop, 412 U.S. 346 (1973). Those decisions are based on the recognition of the tax "law is complicated, accounting treatment of various items raises problems of great complexity,, and innoent errors are numerous. . . .[I]t is not the purpose of te tax law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care." Spies v. United States, 317 U. S.

492, 496 (1943).

We do not believe that section 1324(a) is so complex or so likely to ensnare innocent violators that the unusual defense of ignorance of the law must be read into it. The statute's prohibitions are neither detailed or arcane. The subject mater -- transportation and harboring of illegal aliens -- is one highly likely to be subejct to governmental regulation. It is true that mere transportaion of illegal aliens to and from the fields on the ranch or farm where they ware working does not fail within a fair reading of the prohibitions of section 1324. United States v. Moreno, 561 F.2d 1321 (9th Cir. 1977). It is not reasonable to conclude from that fact, however, that employers will innocently assume that the law is unconcerned with such practices as transporting the aliens in trucks with radios tuned to border patrol frequencies in order to "protect the illegal aliens. We attribute to Congress no

intent to depart from the traditional rule. See United States v. International Minerals & Chemicals Corp., 402 U.S. 558, 563 (1971). tThe district court was accordingly correct to apply it. See United States v. Williams, No. 82-1078, slip op, at 3728, 3729 (9th Cir. Aug. 24,1982).

Motion for Judgment of Acquittal

Appellants move for a judgment of acquittal at the close of the voernment's case. They argued that the government had failed to prove one of the essential elements of the crime of transportation - that an object of the alleged conspiracy was to transport workers who had illegally entered the United States within the last three years. See United States v. Gonzalez-Hernandez, 534 F.2d 1353, 1354 (9th Cir. 1976); 8 U.S.C. Section 1324(a)(2). The district court denied the motion.

Proof that appellants knew they were transporting aliens who had illegally

entered the United States within the last three years may be based upon circumtantial evidence. United States v. Herera-Medina, 609 F.2d 376, 380 (9th Cir. 1979). All evidence must be viewed in the light most favorable to the government to determine whether any rational trier of fact could have found beyond a reasonable doubt that appellants knew the workers had entered within the last three years. Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. DeRosa, 670 F.2d 889, 893 (9th Cir. 1982).

The government's evidence satisfied this standard. In particular we note that Adriano sought and received workers from Oaxaca, Mexico. Workers were brought to Madera in the cargo compartments of rented trucks and paid between $80 and $100 each for the privilege. They were transported at night and appellants kept radios tuned to the Border Patrol frequencies "to protect them." These circumstances in and of themselves were sufficient

to support an inference that appellants were aware of the workers' recent entry. See United States v. Boerner, 508 F.2d 1064, 1068 (5th Cir.), cert. denied, 421 U.S. 1013 (1975). The districtcourt did not err in denying appellants' motion for judgment of acquittal.

Release of Material Witnesses

Perez sought dismissal of the indictment, claiming that the release of the seventeen illegal aliens who wwere arrested with him violated his due process rights. Adriano and Roberto had stipulated to the release at their initial appearance before the magistrate. Perez was not then represented by counsel and did not enter the stipulation. The magistrate subsequqently orderd the aliens released over the government's objection.

The districtcourt denied the motion to dismiss, concluding that the magistrate's decision to release the witnesses was not an

abuse of discretion because Perez had not shown that their testimony could be of conceivable benefit to him. See United States v. Martinez-Morales, 632 F.2d 112, 114-15 (9th Cir. 1980); United States v. Carillo-Frausto, 500 F.2d 234, 235-36 (9th Cir. 1974).

The Supreme Court recently rejectedthe conceivable benefit test, holding that the release of witnesses does not require dismissal of an indictment unless the defendant shows that the witnesses' testimony would have been both material and favorable to his defense. Unied States v. Valenzuela-Bernal, U.S. , 50 U.S.L.W. 5108, 5112 (U.S. July 2, 1982). Perez made no effort to explain what material favorable evidence the departed witnesses would have provided for his defense. The witnesses in question were all involved in one specific incident of transportation and harboring. The evidence presented at trial indicated that Perez was involved in te conspiracy over an extended

period of time. The evidence of acts performed on occasions other than that in question was sufficient to support his conviction. Indeed, it is difficult to see what possible evidence the released witnesses could have supplied which would in any way have aided his defense. The district court did not err in denying his motion to dismiss the indictment. See United States v. Marquez-Amaya, No. 80-1575 (9th Cir. Aug. 17, 1982).

AFFIRMED

FOOTNOTE 1:

Guillen was indicted with appellants but is not a party to this appeal.

FOOTNOTE 2*

8 U.S.C. section 1324(a) provides in part:

Any person, including the owner, operator...agent or consignee of any means of transporttion who

* * *

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law; [or]

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any

building or any means of transpotation;

* * *

any alien . . . not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States . . . shall be guilty of a felony . . . . Provided, however, that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

FOOTNOTE 3:

Although the exception for employment practices is specified in section 1324(a)(3) to apply only to "harboring" aliens, the government concedes that it may in substance be applicable to limited transportation of aliens in connection with employment. See United States v. Moreno, 561 F.2d 1321 (9th Cir. 1977.

FOOTNOTE 4:

The legislative history of section 1324 elaboration of its meaning. The House Report

merely notes that the section was drafted in its present form to overcome the effect of United States v. Evans, 333 U.S. 483 (1948), which held that the prior statue provided no penalty for concealing and harboring illegal aliens. H.R. Rep. No. 1365, 82d Cong., 2d Sess., reprinted in 1952 U.S. Code Cong. & Admin. News 1653, 1724.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 9 19

PHILLIP B. WINBERR
CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellees,	)	
-vs-	)	No. CA 81-1790 81-1791
ADRIANO B. FIERROS, RALPH ANTHONY PEREZ and ROBERTO GONZALES FIERROS,	)	81-1792 81-1144
Defendants-Appellants.	)	O R D E R

BEFORE: HUG, FERGUSON & CANBY, Circuit Judges

The opinion of this court in United States v. Fierros, Nos. 81-1790 and 81-1792 (9th Cir. Nov. 26, 1982), slip op. at 5477, is modified as follows:

At slip op. at 5478, right column, line 16:

"his son, Roberto" is changed to "his father, Roberto."

At slip op. at 5479, left column, lines 2-3:

"Adriano's bus, which" is changed to "a bus that"

At slip op. at 5479, left column, lines 24-25:

"Adriano's bus" is changed to "the radio-equipped bus."

At slip op. at 5479, left column, line 26:

"Perez paid" is changed to "Adriano paid."

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
APR 08 1983
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellees,

-vs-

ADRIANO B. FIERROS, RALPH ANTHONY PEREZ and ROBERTO GONZALES FIERROS,

Defendants-Appellants.

NO.CA 81-1790
81-1791
81-1792
81-1144

O R D E R

BEFORE: HUG, FERGUSON and CANBY, Circuit Judges

A majority of the panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.